

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





To be argued by:  
JOYCE KRUTICK BARLOW

77-1210

United States Court of Appeals  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA  
Respondent

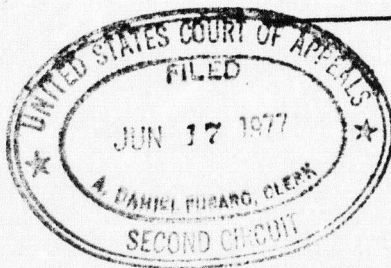
against-

TERRENCE R. IRVING,

Defendant - Appellant

APPEAL FROM A JUDGMENT OF THE  
UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S BRIEF



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## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                    | <u>Page</u> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Preliminary Statement.....                                                                                                                                                                                                                         | 1           |
| Questions Presented.....                                                                                                                                                                                                                           | 2           |
| Statement of Facts.....                                                                                                                                                                                                                            | 3           |
| POINT I -- The Trial Court Erred in Ruling That The Government<br>May Refuse to Accept a Waiver by a Defendant of His or Her<br>Constitutional Rights. A defendant has an Absolute Right<br>to Waive any Constitutionally Protected Privilege..... | 13          |
| POINT II -- The Lower Court Erred in Holding That The<br>Superseding Indictment was Timely Filed.....                                                                                                                                              | 16          |
| POINT III -- The Trial Court Erred in Permitting the Government's<br>Handwriting Analyst to Testify that it was possible that the<br>Defendant had Written the Endorsement Charles Vantassel on<br>Government's Exhibit I.....                     | 21          |
| Conclusion.....                                                                                                                                                                                                                                    | 24          |



## TABLE OF AUTHORITIES

| <u>Cases:</u>                                                                                      | <u>Pages</u> |
|----------------------------------------------------------------------------------------------------|--------------|
| CONKLIN v. COZART, 65 F. Supp 731, aff'd 158 F. 2nd<br>676 cert. den. 332 U.S. 801.....            | 14           |
| GILLMORE v. STATE OF UTAH, 45 U.S.L.W. 4053.....                                                   | 13           |
| MARTIN v. U.S., 284 F. 2nd 217 (9th Cir.).....                                                     | 22           |
| ROLLERSON v. U.S., 343 F. 2nd 269 (9th Cir. 1964).....                                             | 22           |
| SMITH v. U.S., 360 U.S. 1.....                                                                     | 14           |
| U.S. v. CUMBERBATCH (S.D.N.Y., 76 Cr.1076 Feb.1977...                                              | 17           |
| U.S. v. GILL, 55 F. 2nd 399 (U.S.D.C.N.M. 1931.....                                                | 14           |
| U.S. v. JONES, 177 F. 2nd 476 (C.A. Ind. 1949.....                                                 | 15           |
| <br><u>Statutes and Rules</u>                                                                      |              |
| Title 18 U.S.C., Section 495.....                                                                  | 1            |
| Title 18 U.S.C., Section 1709.....                                                                 | 1            |
| 18 U.S.C. 1361 (b).....                                                                            | 19           |
| Federal Rules of Evidence, Rule 703.....                                                           | 21           |
| House Report No. 93-1508, Nov. 27, 1974, U.S. Congressional<br>News and Administrative Report..... | 18           |
| <br><u>Other Sources</u>                                                                           |              |
| U.S. Congressional News and Administrative Reports 1974<br>7422-23.....                            | 19           |
| U.S. Congressional News and Administrative Reports 1974,<br>7455.....                              | 20           |

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
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UNITED STATES OF AMERICA

-v-

TERRENCE R. IRVING,  
Defendant.  
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PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction after jury trial of the offense of uttering a forged instrument (Title 18, U.S.C., Section 495) and embezzlement of mail by a postal employee (Title 18, U.S.C., Section 1709.) The judgment was entered against the defendant on April 7, 1977. The trial in this matter commenced on February 22, 1977.

On April 7, 1977, the defendant was sentenced to a term of probation on each count for a period of two years, the sentence to run concurrently. A special condition of probation was the restitution of the sum of \$329 to the United States Government.



### QUESTIONS PRESENTED

1. Did the Trial Court err in ruling that the government may refuse to accept a waiver by a defendant of his or her constitutional rights? A defendant has an absolute right to waive any constitutionally protected privilege.

2. Did the Trial Court err in ruling that the superseding indictment was timely filed?

3. Did the Trial Court err in permitting the government's handwriting analyst to testify that it was possible that the defendant had written the endorsement Charles Vantassel on Government's Exhibit I?

## STATEMENT OF FACTS

### Pre-Trial Proceedings

The appellant, Terrence Irving, was arrested on November 3, 1976 in Poughkeepsie, N. Y., and arraigned before Magistrate Garrity (on the same date) upon a complaint charging a violation of Title 18 U.S.C. Section 1708. (A 1)<sup>1</sup>

On December 10, 1976, appellant's counsel (Joyce Krutick Barlow) was advised by Assistant United States Attorney Korn, that appellant would be subpoenaed to appear before the Grand Jury. Counsel was advised that the subpoena would be returnable on December 20, 1976. At that time the Assistant United States Attorney, after being questioned as to the purpose of this subpoena, stated that he believed it was his right to have Miss Irving appear for questioning.

On December 20, 1976 (the return date of the subpoena) Mr. Korn<sup>2</sup> advised appellant's counsel that Miss Irving was the target of the Grand Jury investigation. It was during this conversation that appellant's counsel informed Mr. Korn of appellant's intention to waive her right to be prosecuted by a Grand Jury. Mr. Korn then stated

1 References are to the pages in appellant's appendix.

2 The Assistant United States Attorney assigned to prosecute appellant.



that he would not consent to prosecute Miss Irving on an information.

Later that same day, Robert A. Katz<sup>3</sup> appeared with appellant before the Grand Jury. Mr. Katz immediately demanded of Mr. Korn that appellant be brought before the Part I judge. Mr. Korn stated that he wanted Miss Irving to enter the Grand Jury and invoke her privilege against self-incrimination. Mr. Katz refused to permit this procedure and insisted upon the right to appear before the Court.

Within minutes, Mr. Korn, Mr. Katz and Miss Irving appeared before Judge Carter. On behalf of appellant, Mr. Katz orally moved to quash the subpoena upon the ground that Miss Irving was the defendant in the matter as well as the target of the Grand Jury, and in that capacity she waived her right to be prosecuted by a Grand Jury indictment. The Court denied counsel's application. Thereupon, Miss Irving went before the Grand Jury and asserted her privilege against self-incrimination. (A6, A34)

On December 30, 1976, the defendant-appellant was arraigned upon a one count indictment charging a violation of 18 U.S.C. 1705 (A 3)

3 A partner in the firm of Barlow, Katz & Barlow.

On January 10, 1977, a pre-trial conference was held before Judge Stewart. At that time counsel indicated that she would move to dismiss the indictment. Taking into consideration counsel's intentions, the Assistant United States Attorney wrote to Mrs. Barlow on January 20, 1977. In this letter he advised her that in order to avoid a hearing upon the validity of the indictment, he had re-presented the case to a new Grand Jury. He further advised counsel that the new indictment contained an additional charge, uttering a forged instrument.

On February 7, 1977, a motion was filed on behalf of the defendant-appellant seeking: an in camera inspection of the Grand Jury minutes for both proceedings; dismissal of the indictment predicated upon a violation of Miss Irving's constitutional right to waive prosecution by a Grand Jury indictment; dismissal of the indictment and superseding indictment upon the ground that it was not timely filed under the Second Circuit's Plan for Prompt Disposition of Criminal Cases; and for an order permitting the use at trial of the testimony of a polygraph expert and the results of the test (A 16 ) administered to defendant-appellant.

It was defendant's contention that she had an absolute constitutional right to waive prosecution by a Grand Jury and that



the government's refusal to accept this waiver was a violation of defendant-appellant's rights and should result in a dismissal of the indictment. Miss Irving further contended that the superseding indictment (which was handed down after the expiration of the government's time to file an indictment pursuant to Rule 3 of the Plan for Prompt Disposition of Criminal Cases) was untimely and therefore had to be dismissed.

The Trial Court, in a memorandum decision dated February 18, 1977, denied defendant's motion. (A 28)

#### The Trial

The trial of this matter commenced on February 22, 1977.

#### The Government's Case

The government's first witness was Mr. Charles Vantassel, who testified that he was the recipient of a United States Government disability pension. He stated that he had a post office box at the Poughkeepsie Post Office and that normally his son picks up his check. He was shown Government's Exhibit I (a United States Government check payable to Charles Vantassel.) He testified that he did not receive this check, nor did he endorse the name Charles Vantassel on the back. He further testified that he had not authorized anyone to sign his name and that he did not know the defendant or anyone named

Terrence Irving. In addition he stated that he made a claim for the check that he did not receive.

Charles Vantassel, Jr. was called as the government's second witness. He testified that he was the son of Charles Vantassel, the payer of the check. He further testified that on February 1, 1976 he went to the post office to pick up his father's disability check but that it was not in the box. He went back several times on the next day but the check was still not there. He also stated that he did not sign the name Charles Vantassel on the back of Government's Exhibit I.

The government then read to the jury a stipulation entered into between the defendant and the government to the effect that if one G. Clark, the Director of the Austin Disbursing Center Division of Disbursement, were called to testify, he would testify that United States Treasury check No. 90386496, dated February 1, 1976, payable to Charles Vantassel, was issued and mailed and properly addressed on January 28, 1976.

The government next called John Viola, Superintendant of Window Services in Poughkeepsie, New York. He testified that Miss Irving was employed at the Poughkeepsie post office. He also identified Miss Irving's work schedule and through Mr. Viola, her time cards were introduced into evidence. Upon cross-examination he testified that



approximately 66 postal employees (including the defendant) had access to the area where the postal boxes were.

Thomas J. Walsh was the government's next witness. He testified that he was an officer of Dutchess Bank & Trust Company and that the defendant had an account at the bank. He identified her signature cards. Mr. Walsh examined Government's Exhibit I and identified the check as having been cashed by one of his tellers.

Mr. Walsh stated that on June 14 or 15 he received a request for a refund on the check. He spoke with the teller who told him that she had cashed the check for a customer. He then testified that he called Miss Irving and requested a refund. She came into the bank, spoke with him and she stated that she did not cash the check and that it was not her signature.

The government's next witness was Frankie E. Franck, a document analyst in the Crime Laboratory in Washington, D. C. He was qualified as an expert in handwriting analysis and testified as to his examination of the handwriting on Government's Exhibit I. He testified that it was his opinion that the second endorsement was written by the same person who had written Government's Exhibits 4, 5 and 6. (It is conceded that Government's Exhibits 4, 5 and 6 were written by the defendant.) He further testified that it was his

opinion that the signature on Government's Exhibit I of Charles Vantassel was not written by the true Charles Vantassel.

Over counsel's objection, he was permitted to testify that it was possible that Miss Irving had also written the first endorsement and that she could not be eliminated as the writer of that endorsement.

Billy R. Dotson was the government's next witness. He testified that he was a fingerprint expert in the Postal Service Crime Laboratory. He was qualified as an expert and testified that in examining Government's Exhibit I he found latent fingerprints which matched those of the defendant on the exhibit.

Mrs. Cheryl Linsky, the bank teller, was called and testified that from her tape she could tell that the check in question was cashed on February 6, 1976 between noon and 12:20. She further testified that she did not recognize Miss Irving, but she did recognize the signatures belonging to a customer and therefore cashed the check. She also stated that she did not ask the customer for identification.

The government next called John Hall, another postal supervisor. He testified as to the physical layout of the post office, and interpreted the time cards previously introduced into evidence. He testified that according to Miss Irving's time card, on February 6, 1976, she left for lunch a few minutes before 12 and returned one minute after one.



The government then recalled Mr. Dotson who testified that he had compared a palm print found on the check with a palm print taken of the defendant the evening before. He stated that it was his opinion that they belonged to the same person.

#### The Defendant's Case

The defendant took the stand in her own defense. She testified that she was a postal employee, suspended as a result of her arrest on this indictment. She testified that the first time she saw the check in question was in June when she spoke to Mr. Walsh. She stated that she never signed nor cashed the check and that she did not take the check from the post office. She further testified as to what occurred when she was first approached by the postal agents. She testified that she did not recall whether any of the agents had handed her the check during their interviews of her. With reference to her time card for the day in question, she stated that the fact that she punched out for lunch did not mean she left the post office. She stated it was standard practice for all employees to punch out even if they did not go out for lunch. As to her own situation, she stated she did not recall whether she had left for her lunch hour that day. She further stated that it was her general practice to remain in the post office at lunch hour.

The defendant then called Frank Giordano, a postal employee, as a character witness. He stated that he believed her to be honest and a conscientious worker, and that he had never heard anything negative about her. Mr. William Henry, another postal employee, also testified as to the defendant's character.

The defendant then called Maybelle Melius who testified that she knew the defendant and was testifying at her request. She testified that she maintained a checking account with the Dutchess Bank & Trust Company. She explained that on many occasions she had cashed second party checks at several branches and had always been required to produce identification even when she was known by the tellers. This included the branch at which the transaction in this case took place.

#### The Rebuttal

The government produced inspectors Kennerson and Howd who testified that during their interviews of the defendant, they exhibited to her photocopies of the check in question and not the original.



The Verdict

The jury returned a verdict of guilty on all counts.

The Sentence

On April 7, 1977, the defendant was placed on probation for a period of two years on each count to run concurrently with a special condition that the defendant make restitution of the amount of the check. The defendant-appellant is currently serving the sentence.

POINT I

THE TRIAL COURT ERRED  
IN RULING THAT THE  
GOVERNMENT MAY REFUSE  
TO ACCEPT A WAIVER BY A  
DEFENDANT OF HIS OR HER  
CONSTITUTIONAL RIGHTS.  
A DEFENDANT HAS AN ABSOLUTE  
RIGHT TO WAIVE ANY CON-  
STITUTIONALLY PROTECTED  
PRIVILEGE

The defendant-appellant in her pre-trial motion contended that she had an absolute right to waive any constitutionally protected privilege. By refusing to accept this waiver and seeking a Grand Jury indictment rather than prosecuting by an information, the government violated the defendant's absolute right to waive this privilege.

The lower Court held in effect that a defendant does not have an absolute right to waive any constitutional privilege. In light of the United States Supreme Court's decision in BESSIE GILLMORE, Applicant and Next Friend of GARY MARK GILLMORE, Applicant v. STATE OF UTAH, 45 U.S.L.W.4053 (Dec. 1976) the lower Court's position is untenable and constitutes error.

In the GILMORE matter, the United States Supreme Court held that a defendant may make a knowing and intelligent waiver of any and all federal rights. 45 U.S.L.W. 4053. The Court has also



held that an accused may waive the right to be prosecuted upon a Grand Jury indictment. SMITH v. U.S. 360 U.S. 1, 79 S. Ct. 991, (1959). See also U.S. v. GILL, 55 F. 2d 399 (U.S.D.C., N.M., 1931).

The defendant in the case at bar made a knowing and intelligent waiver of this privilege afforded by the Fifth Amendment. By her counsel, in open court, the defendant stated that she wished to be prosecuted by information and that she wished to waive indictment. The prosecutor, insisting on his "right" to have the defendant appear in the Grand Jury refused to consent. As a result, Judge Carter permitted the subpoena to stand and allowed the prosecutor to continue to pursue an indictment. (A 6-13) This stance was wholly improper, as the privilege of being indicted by a Grand Jury is the accused's privilege. CONKLIN v. COZART, 63 F. Supp. 731, aff'd 158 F. 2d 676, cert. den. 332 U.S. 801, 68 S. Ct. 92. The prosecutor has no inherent right to prosecute by indictment if the defendant or accused wishes to waive this protection.

The right to be indicted by a Grand Jury is granted to the people of the United States of America in Amendment 5 to the United States Constitution. This right may be waived by an intelligent

accused, since an accused may waive any constitutional right that is in the nature of a privilege, or which is designed for his protection or benefit. U.S. v. JONES, 177 F 2d. 476, (1949, C.A. Ind.); BESSIE GILMORE, Applicant and Next Friend of GARY MARK GILMORE, Applicant, v. STATE OF UTAH, supra.

The prosecutor's insistance upon bringing the defendant herein into the Grand Jury, after she waived her right to be prosecuted by indictment was a blatant violation of her rights. This especially since he was informed that she would not testify but rather would assert her privilege against self-incrimination.

The government's attempt to cure this defect by re-presentation to a Grand Jury is not sufficient. The taint to the indictment continues and therefore, the indictment should be dismissed.



POINT II

THE LOWER COURT ERRED  
IN HOLDING THAT THE  
SUPERSEDING INDICTMENT  
WAS TIMELY FILED

The Speedy Trial Act of 1974 is encompassed in 18 U.S.C.A. 3161. The act does not provide for a situation in which a superseding indictment is filed by the prosecution in an attempt to circumvent a taint created by the government's violation of the accused's rights in the prior presentation. The act does, however, provide for the time limits within which a new indictment may be filed after the dismissal of the original one upon motion of defense counsel. The plan promulgated by this district pursuant to 18 U.S.C. 3165, 3166, also fails to provide for the specific circumstances of this case.

The defendant herein contends that since the superseding indictment charges a new offense which the government could have charged in the original indictment, the superseding indictment should have been brought no later than January 3, 1977. (The time limitation within which the original indictment had to be voted.) The Southern District Plan Rule 3 requires that where an arrest occurs after July 1, 1976, but prior to July 1, 1977 any indictment or information must be filed within 60 days of arrest.

Rule 5 (d) (2) of the Plan directs that when a superseding

indictment is filed and the original indictment is pending the trial must be commenced within the time limits specified for the original indictment. This, however, presupposes the fact that the superseding indictment is brought properly and in good faith.

In the case at bar there can be no doubt that the purpose of the superseding indictment was to attempt to cure the taint placed upon the original indictment. That this is so is evidenced by the Assistant United States Attorney's statements to defendant's counsel. (A 14 ) Thus, rule 5 cannot be held to apply.

The lower Court, in holding that the superseding indictment was timely filed relied solely on the opinion of Judge Palmieri in U.S. v. CUMBERBATCH (S.D.N.Y., 76 Cr 1076, Feb. 1977). In that case, Judge Palmieri in dicta states his belief that the Plan for Prompt Disposition of Criminal Cases intended to permit a subsequent indictment at any time after indictment and prior to trial. To support this position, Judge Palmieri cites no law, merely his own opinion. In fact, he states that "it is unclear from the plan how the Courts are to apply the time limits set forth in Rule 3 to subsequent indictments governed by Rule 5(d) (5)." U.S. v. CUMBERBATCH, supra, Slip. Op. 11

A reading of the CUMBERBATCH decision makes clear the



fact that it is very different from the case at bar. In CUMBERBATCH, the original indictment was dismissed because the government had failed to comply with the Interstate Agreement on Detainers. Prior to the dismissal, the government filed what was termed a supplementary indictment. This supplementary indictment did not contain any of the same charges as the original indictment.

In the case at bar, the superseding indictment contained the identical first count as the original indictment. The added charge was one which, given the facts of the case, could have been raised in the original indictment (uttering a forged instrument.) Undoubtedly this is far different from the CUMBERBATCH situation in which both indictments contained wholly different charges.

There appears to be no case law other than CUMBERBATCH which deals with this particular problem under the Speedy Trial Act. Thus, one must examine the legislative history of 18 U.S.C. 3161 et. seq., under which the Second Circuit's Plan was promulgated.

A careful examination of the Act, and House Report No. 93-1508, Nov. 27, 1974 U.S. Congressional News & Administrative Report, 1974, indicates that Congress considered various potential delay situations and dealt with them specifically in 18 U.S.C. 3161(h).

Referring specifically to the problem of indictments, Congress

considered the difficulty many districts would have where no provisions existed for continuous Grand Juries. To prevent dismissal for failure to timely indict Congress enacted 18 U.S.C. 3161(b) giving an additional 30 days to the government in such situations. In discussing this problem the House Report states:

This amendment recognizes the fact that a number of districts do not have a sufficient number of criminal cases to warrant the continuous operation of the grand jury. The Subcommittee found that, in 34 districts, grand juries convened 0 through 10 days; in sixteen districts, 11 through 20 days; and, in fifty districts, 20 or less days during the six-month period from January through June, 1974. Although the Committee recognizes the expenses to the Government and inconvenience of grand jurors, particularly in the larger geographic districts, involved in convening grand juries for a limited number of cases, it believes that every effort should be made to indict individuals within the time limits provided, and invoking this extension only when necessary.

The Justice Department, in a memorandum to the Subcommittee requested by Mr. Cohen, concluded that this provision would not result in the denial of equal protection of the law for defendants accused of crime who are forced to await indictment in districts where grand juries meet infrequently.

U.S. Congressional News &  
Administrative Reports 1974,  
7422-23 (emphasis added)



It was the committee's belief that "every effort should be made to indict individuals within the time limit provided." U.S.C.N. & A.R., Supra, 7423. Had Congress intended to permit an extension for the filing of a superseding indictment it would have been provided for in the bill or at least discussed in the Congressional reports. Yet, neither in the act as passed, nor in the legislative history do we find any references to such an extension.

That such an extension relative to superseding indictments was not intended can be seen from the refusal of Congress to accept the minority viewpoint and the passage of the act as it stands. The minority view as espoused by Messrs Hutchinson, McCloy, Sandman, Dennis, Mayne, Butler, Lott and Frochlich, U.S. Congressional News & Administrative Reports, 1974, 7455, suggesting an expansion of the time limitations and characterizing the act as it stands as unnecessarily strict, was specifically rejected. Thus, it can be seen that Congress intended to maintain a tight rein upon the government. Clearly, Congress did not intend to permit the government to have six months within which to file superseding indictments.

The superseding indictment in the case at bar must fall as being not timely under the Speedy Trial Act and the Second Circuit's Plan for Prompt Disposition of Criminal Cases.

### POINT III

THE TRIAL COURT ERRED  
IN PERMITTING THE  
GOVERNMENT'S HANDWRITING  
ANALYST TO TESTIFY THAT IT  
WAS POSSIBLE THAT THE  
DEFENDANT HAD WRITTEN THE  
ENDORSEMENT CHARLES  
VANTASSEL ON GOVERNMENT'S  
EXHIBIT I

It has long been the rule in American Courts that where evidence given by a person with specialized knowledge will assist the trier of the facts, such a witness may give his or her testimony based upon opinion. Rule 703 Federal Rules of Evidence.

In the case at bar, the government's handwriting expert expressed two separate opinions, one as to each endorsement on Government's Exhibit I. (Tr. 66-68) Mr. Franck concluded, based upon his examination procedure that Miss Irving endorsed the words "T.R. Irving" upon Government's Exhibit I. He was certain of this and his opinion as to this endorsement was unequivocal. (Tr. 65)

When questioned as to his opinion regarding the endorsement "Charles Vantassel", Mr. Franck's opinion was far from unequivocal. Over objection of counsel, Mr. Franck was permitted to testify that he could not

eliminate the writer of Exhibits 4, 5 and 6 as the author of that endorsement. I would phrase my opinion in this way, that it is possible that these two sets of writing were written by the same person. (Tr. 66, 67)



Mr. Franck further testified that he found some similarities between the writings, as well as some differences. (Tr. 67) He was, however, unable to state anything more positive than a possibility that Miss Irving had written the endorsement. This opinion was not supported by sufficient facts.

Although expert testimony is often of value to a jury in deciding a case, clearly

The testimony of an expert, like that of any other witness may be excluded if it reports mere opinion, unsupported by "underlying facts."

ROLLERSON v. U.S., 343 F2d 269,  
270-271 (9<sup>th</sup> Cir. 1964)

An expert opinion which states nothing more than a possibility is not properly admitted into evidence.

But mere possibility is not an affirmative basis for a finding of fact. In the language of the law of evidence, that which is merely possible, standing alone and not offered as auxiliary or rebuttal testimony, is immaterial to the ascertainment of the fact and so is inadmissible as evidence of that fact. So, if an expert scientist can say only that such-and-such is possible, he has done the best he can do from the scientific point of view, but from the standpoint of the law such testimony does not permit the finder of fact to say that such-and-such is actually a fact.

MARTIN v. U.S. 284 F. 2d 217, 219,  
(9<sup>th</sup> Cir., 1960), emphasis added.

Thus, it can be seen that the admission of such testimony was clearly error, and should result in a reversal of this conviction and a new trial.



CONCLUSION

The defendant-appellant contends that the government's blatant violation of her right to waive indictment, and its failure to timely file the superseding indictment require that the conviction be reversed, and the indictments (both the original and superseding) be dismissed with prejudice.

In the alternative, should this Court find that the indictments were proper, appellant requests a new trial upon the ground that expert evidence was improperly admitted at her trial.

Dated: New York, N. Y.  
June 13, 1977

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